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March 10, 2006

By Electronic Mail

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments on Advisory Opinion Request 2006-10

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics in regard to AOR 2006-10, an advisory opinion request submitted by EchoStar Satellite LLC ("EchoStar"), seeking confirmation "that EchoStar may air public service announcements that feature Members of Congress, among other public figures, and the time periods in which EchoStar may air such public service announcements." AOR 2006-10 at 1.

For the reasons set forth below, the Commission should advise EchoStar that its proposed public communications would fall within the scope of 11 C.F.R. § 109.21 if they are publicly disseminated within 120 days of an election of any candidate featured in the ad and, consequently, would constitute "coordinated communications." Payments for such coordinated communications would be in-kind contributions to the federal candidates appearing in the ads, and thus subject to amount limits and source prohibitions of the law.

The existing coordination regulation is clearly applicable on its face. Any exception to the regulation of the type proposed by EchoStar must be established through the rulemaking process, not through issuance of an advisory opinion.¹

¹ The commenters here filed extensive comments in the Commission's pending rulemaking to revise the existing coordination rule, and a representative of each organization testified at the public hearing held in the matter. See Comments of Campaign Legal Center, Democracy 21 and the Center for Responsive Politics, filed January 13, 2006 in Notice of Proposed Rulemaking 2005-28, "Coordinated Communications," 70 Fed. Reg. 73946 (Dec. 14, 2005). For reasons explained at length in the rulemaking comments and testimony, the commenters are critical of the existing coordination rule for not being sufficiently inclusive, and have urged the Commission to broaden the scope of the rule in numerous ways.

I. EchoStar's proposed communications clearly fall within the scope of existing coordination regulation and would constitute in-kind contributions subject to contribution amount limits and source prohibitions.

The Commission's regulations provide that a communication is coordinated with a candidate when the communication:

- is paid for by a person other than that candidate;
- satisfies at least one of the coordination regulation content standards; and
- satisfies at least one of the coordination regulation conduct standards.

11 C.F.R. § 109.21(a). The Commission's regulations further provide that "[a] payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution . . . to the candidate . . . with whom it is coordinated . . ." 11 C.F.R. § 109.21(b)(1).

The communications proposed by EchoStar in AOR 2006-10 would clearly meet the three requirements of 11 C.F.R. § 109.21(a). EchoStar does not dispute this conclusion in its advisory opinion request.

First, the communications would be paid for by a person other than a federal candidate — namely, by EchoStar.

Second, the communications would meet the content standard at 11 C.F.R. 109.21(c)(4), because the communications would:

- meet the definition of "public communication";
- refer to a clearly identified federal candidate;
- be distributed within 120 days of a federal election²; and
- be directed to the voters in the jurisdiction of the clearly identified candidate.

Third and finally, although EchoStar does not discuss the applicability of the conduct standards, the communications proposed in AOR 2006-10 would almost surely meet one or more of the conduct standards at 11 C.F.R. § 109.21(d). The proposed communications would likely be created at the suggestion of either EchoStar or the featured federal candidate, *id.* at § 109.21(d)(1); with the "material involvement" of the candidate, *id.* at § 109.21(d)(2); or after "substantial discussion" about the communication between EchoStar and the featured candidate, *id.* at § 109.21(d)(3). *See* Ad. Op. 2004-1 (appearance by a federal candidate in an ad satisfies the "material involvement" conduct prong of coordination rules); Ad. Op. 2003-25 ("[I]t is highly

² The AOR specifies that the proposed communications will not be run within the 30/60 day pre-election time frames of Title II, but does not specify that they will be run within the 120 day time frame of the existing coordination rule. For purposes of these comments, we assume that EchoStar is proposing to run at least some ads within the 120 day period, since most of the analysis in the AOR is devoted to distinguishing the applicability of this time frame standard.

implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication.”)

Consequently, under the Commission’s existing coordination regulation, EchoStar’s payments for its proposed communications would be, *per se*, “coordinated communications” under 11 C.F.R. § 109.21(b)(1) and, as in-kind contributions, would be subject to federal amount limits and source prohibitions.

II. Any exception to existing coordination regulation for communications of the type proposed by EchoStar must be established through the rulemaking process, not through issuance of an advisory opinion.

Given the clear applicability of the Commission’s existing coordination regulation to EchoStar’s proposed activities, what EchoStar actually requests in AOR 2006–10 is not clarification regarding the application of regulation to its proposed activities but, rather, an exemption from the regulation for its proposed activities. EchoStar, in effect, urges the Commission to establish a *new rule of law* — effectively, a “public service announcement” exemption from the coordination regulation — through the advisory opinion process.

However, any such exception to existing coordination regulation must be established through the rulemaking process, not through issuance of an advisory opinion. Under the Federal Election Campaign Act and Commission regulations, a new rule of law “may be initially proposed by the Commission only as a rule or regulation,” not as an advisory opinion. 2 U.S.C. § 437f(b); *see also* 11 C.F.R. § 112.4(e).

EchoStar acknowledges that the Commission is currently conducting a rulemaking on coordinated communications. AOR 2006–10 at 5. EchoStar also notes that among the issues under consideration in the rulemaking is whether to incorporate into 11 C.F.R. § 109.21 a “for the purpose of influencing a federal election” standard — precisely the standard EchoStar argues should be employed to exempt its proposed communications from existing coordination regulation. *Id.*

EchoStar admits that its legal question “*may* be clarified in the Commission’s rulemaking” on coordinated communications, currently underway. AOR 2006–10 at 7n.3 (emphasis added). We submit that the Commission *may only* create the exemption sought by EchoStar through a rulemaking process.

Conclusion

For the reasons set forth above, we urge the Commission to advise EchoStar that its proposed activities fall within the scope of the Commission’s existing coordination regulation. We further urge the Commission to decline EchoStar’s invitation to establish — by advisory opinion — a new rule of law that would exempt certain communications from the existing coordination regulation. Instead, the Commission should address this question, if it deems appropriate to do so, through a rulemaking process.

We take no position at this time on whether the Commission has provided sufficient notice in the pending rulemaking to promulgate a specific PSA-type exemption to the "content" rules of the coordination regulation. We also take no position here on whether such an exemption from the coordination rules should be created in the pending, or in any future, rulemaking on coordination.³

To the extent that the Commission considers matters relating to the EchoStar issue in the pending coordination rulemaking, such as, e.g., the "for the purpose of influencing" standard discussed in the AOR and proposed by EchoStar, we refer the Commission to the detailed written comments we submitted in that rulemaking, and ask that those comments, along with the oral testimony of representatives of all three organizations, be considered in this regard.

Respectfully,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

/s/ Lawrence M. Noble

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³ We note that The Campaign Legal Center, Democracy 21, and the Center for Responsive Politics have submitted comments in the past, arguing that the Commission, by regulation, should *not* create an exemption for PSAs from the Title II "electioneering communication" rules. And we further note that the Commission itself rejected a proposed PSA exemption to Title II. See *Electioneering Communications Final Rule and Explanation & Justification*, 67 Fed. Reg. 65190, 65202 (Oct. 23, 2002) (noting that commenters "pointed to the possibility that [a PSA] exemption could be easily abused by using a PSA to associate a Federal candidate with a public spirited endeavor in an effort to promote or support that candidate"); see also *Shays v. Federal Election Commission*, 414 F.3d 76, 109 (D.C. Cir. 2005) (noting that failure to create a Title II PSA exemption "would hardly seem unreasonable" given the risk of abuse).

**Copy to: Each Commissioner
Commission Secretary**

1. *Chrysomelidae* (Colorado potato beetle)
 2. *Curculionidae* (Colorado potato beetle)